United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1220

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1220

UNITED STATES OF AMERICA,
Appellee,

—v.—

RAYMUNDA CRUZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1220

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMUNDA CRUZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Raymunda Cruz appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on May 3, 1976, after a three-day jury trial before the Honorable Henry F. Werker, United States District Judge.

Superseding Indictment 76 Cr. 317, filed on April 2, 1976, charged Cruz in eleven counts with obstructing correspondence by taking, opening, and embezzling contents of mail addressed to three individuals, in violation of Title 18, United States Code, Section 1702.*

* This indictment superseded Indictment 75 Cr. 722, which had been filed on July 22, 1975. Both indictments charged the same offenses; the superseding indictment effected only technical amendments.

Trial commenced on April 5, 1976 and ended on April 7, 1976 when the jury found Cruz guilty on all counts. On May 3, 1976, Judge Werker sentenced Cruz to concurrent terms of five years' imprisonment on each count. Execution of all but three months of the sentence was suspended. Cruz has completed serving the custodial portion of her sentence.

Statement of Facts

The Government's Case

A. Synopsis

The evidence at trial showed that between February and November 1974 Cruz repeatedly stole public assistance checks that had been mailed to residents of 60 West 106th Street, New York, New York. During that time period, Cruz was a resident of 60 West 106th Street. (Tr. 42, 53, 100, 200).* She had previously been a superintendent of the building, but she was no longer acting in that capacity when she began stealing mail. (Tr. 41, 208).

B. The Proof at Trial

To prove the mailing of the checks in this case, the Government called August E. Lopez, a supervising clerk in the distribution control section of the New York City Department of Social Services ("DSS"). Lopez identified Government Exhibits 1-11 as checks issued by DSS. (Tr. 17-18).**

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* References to pages of the trial transcript and to Government Exhibits are abbreviated as "Tr." and "GX."

** Government Exhibits 1, 2, 3, 4, 5 and 7 were issued for educational expenses, while the other checks were for the support of dependent children. (Tr. 20).

DSS records showed that Government Exhibits 1-11 had been mailed to the payees: Maria Concepcion, Blanca Garcia and Lydia Mercado. (Tr. 22; GX 21-31).

The payees then testified that they had never received the eleven DDS checks which corresponded to the eleven counts in the indictment, and that the endorsements on each of the checks were forgeries.*

Anthony Rivas, owner of the Amsterdam Grocery Corp., at 976 Amsterdam Avenue, testified that certain of the checks payable to Concepcion, Garcia and Mercado had been cashed at his store; he was able to identify them because his signature or business stamp appeared on the checks. (Tr. 109; GX 3-11). Rivas then identified Cruz as a customer and identified a welfare check payable to Cruz which she had cashed at the store in Rivas's presence. (Tr. 106; GX 12). That check was later returned to Rivas because the endorsement was found to be forged. (Tr. 107). Thereafter, Rivas went to 60 West 106th Street and spoke to Cruz, who agreed to reimburse him. Subsequently, Rivas realized

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* In 1974, Maria Concepcion, a resident of 60 West 106th Street, received her public assistance by mail. Cruz often gave her the mailed checks by hand. Mrs. Concepcion testified that she never received Government Exhibits 1-7 and that the endorsements of her name on those checks were forged. (Tr. 34-36).

Blanca Garcia, a former resident of 60 West 106th Street, stated that she never received Government Exhibits 8, 9 and 10, and she testified that the endorsements on those checks were forgeries. (Tr. 98).

Lydia Mercado, another resident of 60 West 106th Street, identified Government Exhibit 11 as a check payable to her and testified that she had never received it. She further stated that the endorsement of her name on the check was a forgery and, indeed, that her first name was misspelled on the back of the check. Finally, she recalled that her mailbox was found broken on the day that check was due to arrive. (Tr. 50, 55).

that the endorsements on numerous other checks which had been returned to him by DSS as forgeries were in the same handwriting. (Tr. 110-11; GX 3-11). Rivas then spoke to Cruz about those checks, and Cruz agreed to reimburse Rivas in installments for the money he had lost as a result of having cashed those checks. (Tr. 111).

Arturo Rivas, Anthony's father, also testified that he had cashed checks for Cruz at the Rivas's store. (Tr. 131-32; GX 3-11). Cruz told Arturo Rivas, as she had his son, that her neighbors had given her the checks and sent her to shop for them. (Tr. 132).

Postal Investigator Juan Rosa testified that on March 10, 1975, he and Postal Inspector Edward Jones had arrested Cruz. (Tr. 129). After being advised of her rights, Cruz admitted to Rosa that, when she had lived at 60 West 106th Street, she had received from the mailman checks addressed to other residents of the building; she claimed, however, that she had distributed the checks to the addressees. (Tr. 142). Investigator Rosa then identified certain handwriting exemplars—including the signatures "Maria Concepcion," "Lidya Mercado," and "Blanca Garcia", as having been written in his presence by Cruz on the day of her arrest. (Tr. 143; GX 42A-J, 43A-J, 44A-J). Cruz's exemplar of the name "Lidya Mercado" contained the same spelling error of the name Lydia as the forged endorsement on the back of the Mercado check, Government Exhibit 10.

John Murray, a senior document analyst at the Postal Inspection Service Crime Laboratory, testified that he had examined the checks and the handwriting exemplars prepared by Cruz. Murray testified that the endorsement on each of the checks had been written by the same person who executed the exemplars. (Tr. 165).*

The Defense Case

The defense sought, through the testimony of the defendant,** to convince the jury that the eleven checks had been stolen by one Jose Ramos, who then utilized his knowledge of the handwriting of Raymunda Cruz to forge the endorsements in the style of Cruz's handwriting. The defense suggested no motive on the part of Ramos, who was unavailable to either side, other than a desire to avoid detection. Nor did the defense explain why Ramos stopped stealing checks in November 1974, six months before he was caught burglarizing an apartment and disappeared from the neighborhood. (Tr. 228). Cruz's direct testimony was in total contradiction to the testimony of Government witnesses Anthony Rivas, S. Arturo Rivas and John Murray as she systematically denied all involvement in the forgeries.

The defendant testified that she had lived at 60 West 106th Street from August 4, 1970 to December 1, 1974; that she received mail from the mailman for the other tenants but always gave it to them. (Tr. 200); and that she had never cashed a check for anyone,

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* With the aid of photographic enlargements of the known and questioned handwriting, Murray explained at length the many similarities on which his opinion was based. (Tr. 168-80).

** The defense also called a character witness, Mildred Dweck, director of the United Welfare League, who became acquainted with Cruz through that organization.

including herself, at the Rivas's grocery store. (Tr. 200-01). Cruz also testified that she had never forged and cashed anyone's welfare check. (Tr. 201, 205). Cruz testified that Ramos had access to her handwriting, because he and she translated songs from Spanish to English. (Tr. 204).*

On cross-examination, Cruz denied having stated to the Rivases that she was cashing checks on behalf of the payees and she denied making payment to the store for losses incurred on other checks. (Tr. 214, 216, 219). When Cruz was asked whether she had executed any handwriting exemplars subsequent to doing so at the request of the Postal Inspectors on March 10, 1975, she replied that she had not (Tr. 225), after stating she did not know whether a handwriting expert had been retained by the defense. (Tr. 223).

The last defense witness was Anna Hernandez, another tenant at 60 West 106th Street. Hernandez testified that Ramos had been employed as a superintendent at the building and that in April 1975 she had found Ramos in the process of burglarizing her apartment. (Tr. 227). Hernandez had not seen Ramos since that time. (Tr. 228).

The Government's Rebuttal Case

The Government, in a brief rebuttal case, sought to prove that Cruz had perjured herself in denying that she had executed additional exemplars and in claiming that she did not know whether a defense handwriting expert had been retained. Joseph McNally, a handwrit-

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* The lyrics, which she wrote, were preserved in a note book or books which Cruz claimed Ramos kept. (Tr. 205).

ing expert, testified that he had received from Cruz's attorney certain handwriting that was represented to be the handwriting of the defendant. (Tr. 234). McNally was not asked to state his opinion as to who had forged the endorsements on the checks in question.

ARGUMENT

POINT I

The District Court Properly Permitted Inquiry to be made of the Defendant Concerning the Existence of a Defense Handwriting Expert, and, when the Defendant Testified Falsely, the District Court Properly Allowed the Defense Expert to be Called in Rebuttal to Expose the Defendant's False Testimony.

The defendant argues that the attorney-client privilege and attorney work product doctrine precluded any cross-examination concerning her knowledge of the existence of a defense handwriting expert and her preparation of additional handwriting exemplars for use by that expert. She further contends that it was error for Judge Werker to permit the Government to call the defense expert in rebuttal to controvert the defendant's testimony in which she denied that she had prepared additional exemplars. These arguments are meritless.

A. Factual Background

A review of the circumstances which led the District Court to permit the challenged questioning is essential to a full understanding of the issues.

On January 26, 1976, at a pre-trial conference, Mr. Richard G. Rosenbaum, counsel for the defendant, requested in open court and in the presence of the prose-

cutor the appointment of an independent handwriting expert to compare the signatures on the back of the disputed checks with the defendant's handwriting. (Tr. of Pre-trial Conference, Jan. 26, 1976, at 2-3). This request was granted that same day by Judge Werker.*

On March 15, 1976, Joseph McNally, a handwriting expert, directly obtained the questioned checks from the Government. McNally returned the checks to the Government on March 22, 1976 with a cover letter, which stated in pertinent part: "I have completed my analysis of the questioned endorsements on these checks vs. exemplar signature of Raymunda Cruz provided by Richard G. Rosenbaum, defendant's attorney." After McNally's analysis was completed, defense counsel himself informed the Government that the expert's analysis confirmed the Government's view that the defendant had forged the endorsements on the checks.**

The first reference at trial to the expert McNally occurred at the close of the Government's case on April 6 and 7, 1976, when the Assistant advised the Court that he wished to complete the Government's case by calling McNally. The Court was informed that McNally had been retained by the defense and had concluded that Cruz had authorized the questioned endorsements. (Tr. 193). The Government advised that McNally's name had not appeared on a previously submitted list of Gov-

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* Title 18, United States Code, Section 3006A(e)(1) explicitly provides that the application of an indigent for the assistance of an expert witness may be made *ex parte*. That this option was not pursued in this case fully disposes of Cruz's argument (see Br. at 10) that it was only because of her indigency that the prosecutor learned of the identity of the defense expert.

** Because the defendant never came forward with a properly supported claim of attorney-client privilege or attorney work product doctrine, the facts contained in this paragraph never became part of the trial record, though we are confident that they will not be a matter of any dispute.

ernment witnesses because it was thought that his testimony would merely be cumulative, but that the defense cross-examination of the Government's expert Murray, suggesting bias, rendered testimony from McNally of significance. (Tr. 193-94). Defense counsel raised no claim of privilege with respect to McNally's testimony and did not suggest that it was improper to refer to the existence of a handwriting expert who had been retained by the defense; rather, he limited his remarks to disparagment of his own cross-examination of Murray the preceding day. (Tr. 194). The Court ruled that the failure to name McNally on a list of witnesses precluded calling him during the Government's direct case. (Tr. 187, 194).

When the Government rested, the defendant elected to take the stand after being specifically advised by the Court that by so doing she would be exposed to wide-ranging cross-examination. (Tr. 192). As the "Statement of Facts," *supra*, makes abundantly clear, the defendant's testimony on direct examination flatly contradicted the testimony of nearly all the Government witnesses. Most significantly, Cruz claimed she had never forged and cashed anyone else's welfare check, which, of course, contradicted the Government's handwriting expert, Murray, as well as the conclusion of the defense's own expert.

On cross-examination, the Assistant, pursuing an entirely proper line of questioning, was permitted to ask over objection whether a handwriting expert had been engaged by the defense to examine the signatures on the back of the checks. Incredibly—though it was quite evident by this time that Cruz's adherence to her oath was

irregular at best—she responded that she did not know whether an expert had been retained. (Tr. 223).*

The Assistant, aware that McNally's findings had not been based on the exemplars Cruz executed for the Government, then sought to expose the disengenuousness of this claim of ignorance by asking Cruz whether she had executed exemplars for anyone other than Postal Investigator Rosa. (Tr. 224). Cruz twice emphatically denied executing such exemplars. (Tr. 225).**

Having now heard testimony which was quite clearly false, Judge Werker permitted the Government, over ob-

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* The possibility that defense counsel had not informed his client that he had retained an independent handwriting expert and that the expert's conclusions were in accord with the Government's position would have been remote. But in addition, the defendant had—as later became indisputable (Tr. 231)—provided defense counsel with additional handwriting exemplars for the very purpose of obtaining the expert's opinion, and prior to her cross-examination, the Assistant *in the presence of the defendant* informed the Court that the defense expert had reached the same conclusion as the Government's expert. In these circumstances, the falsity of the defendant's testimony was clearly evident to the court, as well as to defense counsel, who sat mute during his client's perjurious responses.

** Defense counsel, who again clearly knew this testimony was false (see Tr. 231), did nothing to correct it. He argues now in a footnote to his brief that:

> "The appellant was uneducated, spoke only Spanish and was completely unsophisticated. It is entirely probable that she did not fully comprehend the meaning of the questions." (Br. at 2).

The simple response to this claim is that the questions asked of Cruz were quite plain, the defendant's responses were categorical, and the record reflects that the defendant had no difficulty understanding the court-appointed interpreter through whom she testified. (Tr. 199). If defense counsel had thought his client had misunderstood these questions, it was his obligation to seek a clarification at the time, and not let this false and self-serving testimony stand uncontradicted.

jection that the work product doctrine would be breached, to call the expert McNally. However, the Court carefully limited the permissible scope of inquiry to whether or not McNally had been provided with exemplars prepared by the defendant—in other words, to demonstrating that the defendant had testified falsely. (Tr. 231-32).

McNally then testified that he had received from defense counsel handwriting exemplars represented to have been executed by Raymunda Cruz. (Tr. 234).

B. Judge Werker Did Not Err in Permitting the Government to Cross-Examine the Defendant About the Existence of A Second Expert.

The first objection raised by Cruz is to the prosecutor's questioning during cross-examination concerning the existence of a second expert who had examined the checks in question. Judge Werker acted well within the permissible bounds of his discretion in allowing this line of inquiry.

The trial judge correctly recognized that the right to prove the existence of possible witnesses through cross-examination of a party, or of party witnesses, flows necessarily from the well-established principle that the Government may urge the jury to weigh the fact that a defendant has failed to call a witness with knowledge of the facts who might have contradicted or explained the Government's evidence. *United States* v. *Dioguardi*, 492 F.2d 70, 81-82 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974); *United States* v. *Lipton*, 467 F.2d 1161, 1168-69 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States* v. *Deutsch*, 451 F.2d 98, 117 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970); *United States* v. *DiBrizzi*,

393 F.2d 642, 646 (2d Cir. 1968). This line of argument is equally proper when the defense fails to call an expert witness. *Ignacio* v. *People of the Territory of Guam*, 413 F.2d 513, 521 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970) (failure to call ballistics expert); 2 Wigmore, Evidence § 290, at 177 (3d ed. 1940).

Because it was proper to argue that the jury should consider the failure of the defense to call an expert defense witness, it was altogether proper for the trial judge to permit the Government to lay a foundation for this argument by establishing, through the defendant, that a second expert had made a handwriting comparison. See *United States* v. *Grammer*, 513 F.2d 673, 676 (9th Cir. 1975) (Government proved the existence of a defense fingerprint expert on its direct case). Indeed, this line of inquiry was all the more appropriate, since the defendant had elected to take the stand to contradict the Government's handwriting expert. *Cf. United States* v. *Milano*, 443 F.2d 1022, 1028 (10th Cir.) (Coffin, *J.*, sitting by designation), *cert. denied*, 404 U.S. 943 (1971).

In light of this accepted practice, Cruz does not appear to argue that it was improper *per se* to establish that the defense had not called its own expert. Rather, she claims that the questioning breached the attorney-client privilege and the work product doctrine.

The short answer to this contention is that the prosecutor's questioning concerning Cruz's awareness of the existence of a second expert elicited a response which could not possibly be said to be encompassed by the protections of the attorney-client privilege or work product doctrine. She simply responded that she was unaware of a second expert. *Cf. United States* v. *Canniff*, 521 F.2d 565, 570 (2d Cir. 1975), *cert. denied sub nom. Benigno* v. *United States*, 423 U.S. 1059 (1976). Thus, her response did not reveal communications with her attorney or anything at all about the defense camp.

But even assuming that the questioning had elicited an acknowledgment by Cruz of the existence of a second expert, there would plainly have been nothing objectionable about the Government's inquiry. With respect to the attorney-client privilege, there was no showing or claim made below that a truthful response to the question would expose a *confidential* communication between Cruz and her attorney concerning the securing of legal advice.* This was hardly surprising, since everything that had happened prior to trial indicated that nothing about this second expert was intended by the defense to be *confidential*: the application for appointment of the expert was made in open court; the expert personally picked up the checks from the Government and later returned them together with a letter, confirming that he had compared the checks with known exemplars of the defendant's handwriting; and defense counsel later voluntarily revealed the results of the expert's examination to the Government.

Moreover, since the fact of retention of an attorney is not covered by the privilege, and a lawyer may not

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* The attorney-client privilege is defined in this Circuit as follows:

> "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived . . . ."

United States v. *Stern*, 511 F.2d 1364, 1367 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975); *United States* v. *Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); 8 Wigmore, Evidence § 2292, at 554 (McNaughton rev. 1961).

It is well-settled that the burden of establishing a claim of attorney-client privilege rests on the party asserting it. *United States* v. *Stern*, *supra*, 511 F.2d at 1367; *In re Bonnano*, 344 F.2d 830, 833 (2d Cir. 1965); *United States* v. *Kovel*, *supra*, 296 F.2d at 923.

refuse to disclose the identity of his client, see *United States* v. *Ponder*, 475 F.2d 37, 39 (5th Cir. 1973); *In re Semel*, 411 F.2d 195, 197 (3d Cir.), *cert. denied*, 396 U.S. 905 (1969); *Colton* v. *United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States* v. *Pape*, 144 F.2d 778, 782 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944), an expert's retention and identity should be accorded no greater protection by the privilege.

Equally unconvincing is Cruz's argument that this line of inquiry violated the attorney work product doctrine. Again, the defendant's response to the questioning concerning the existence of a second expert revealed nothing. And even assuming that the existence of a second expert had been acknowledged by the defendant, the doctrine would not have been breached.

The attorney work product doctrine is premised on a concern for the adverse consequences of *judicially-compelled* disclosure of an attorney's or his agent's preparations for trial. See *United States* v. *Nobles*, 422 U.S. 225 (1975); *Hickman* v. *Taylor*, 329 U.S. 495 (1947). In *Hickman*, the seminal decision enunciating the doctrine, the Supreme Court stressed the attorney's need for "a certain degree of privacy, free from *unnecessary intrusion* by opposing parties and their counsel," in order to permit the attorney to "prepare his legal theories and plan his strategy *without undue and needless interference*." 329 U.S. at 510, 511 (emphasis added).* In *Hickman*, the

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* Accordingly, in nearly all of the litigated cases involving work product the issue has been raised when a party seeks to compel disclosure of the unrevealed information in question. See *United States* v. *Nobles*, *supra* (disclosures at trial); *Hickman* v. *Taylor*, *supra* (disclosures in pre-trial discovery); *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973) (disclosure in the grand jury); *Matter of Rosenbaum*, 401 F. Supp. 807 (S.D.N.Y. 1975) (*id.*); *In re Terkeltoub*, 256 F. Supp. 683 (S.D.N.Y. 1966) (*id.*).

Court stated that the compelled production of counsel's written statements and mental impressions of witness interviews would bolster "[i]nefficiency, unfairness and sharp practices," which would have a "demoralizing" impact on the legal profession. *Id.* at 511.

It is clear that no breach of this salutary doctrine occurred here, because the work product doctrine, like the attorney-client privilege, is meant only to protect matters which have been treated by the defense with some degree of confidentiality. The doctrine seeks to avoid requiring the defense to assist their adversaries by disclosing matters learned and collected by the defense. Here, the defense saw to it that the existence of a second expert became a matter of public knowledge. To enforce a doctrine which protects against forced disclosure of defense confidences when the information has been made a matter of public record by the defense would border on the absurd.

Secondly, the work-product doctrine is meant to protect information secured by the defense camp in anticipation of litigation. *Hickman*, for example, involved "an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney . . ." 329 U.S. at 509. The Court went on to say that it wanted to prevent the court-ordered disclosure of an attorney's thoughts, as reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." 329 U.S. at 511. It is difficult to see how the simple fact of retention of an expert witness falls within the scope of this doctrine. Neither the defense theory of the case nor information learned by the defense about the facts of the case was disclosed by anything the Assistant did in this case. *Cf. In re Grand Jury Proceedings*, 473 F.2d 840, 841 (8th Cir. 1973).

C. Once The Defendant Claimed No Knowledge Of A Second Expert, The District Court Properly Exercised Its Discretion In Permitting The Government To Test The Defendant's Credibility By Asking About The Preparation Of Additional Handwriting Specimens.

The defendant's testimony that she did not know whether a second handwriting expert had examined the check was clearly incredible, though undoubtedly at that point less so to the jury which was then unaware that the defense had secured the assistance of an expert who had returned the checks to the Government with a letter which stated that he had examined the checks in comparison with exemplars identified by Cruz's attorney as the defendant's. In this circumstance, Judge Werker, who, knowing of the existence of the defense expert, doubtless recognized the incredible nature of Cruz's testimony, acted well within his discretion, see *United States* v. *De Marco*, 488 F.2d 828, 831 n.8 (2d Cir. 1973); *United States* v. *Lewis*, 447 F.2d 134, 139 (2d Cir. 1971); *Leeper* v. *United States*, 446 F.2d 281, 288 (10th Cir. 1971), *cert. denied*, 404 U.S. 1021 (1972); F. R. Evid. 402, 403, in permitting the Government to probe the defendant's "I don't know" response by asking the defendant whether she had prepared handwriting exemplars for anyone other than the postal inspectors. The defendant's truthful admission that she had prepared additional exemplars would, of course, have cast considerable doubt on the veracity of her response that she was unaware of a second expert.

The objections which Cruz raises to this inquiry by the prosecutor, again premised on violations of the attorney-client privilege and the work product doctrine, are entirely without merit. As with the arguments raised

with respect to inquires concerning Cruz's knowledge of the existence of a second expert, the short answer to these arguments is simply that since the questions about the execution of additional exemplars resulted in Cruz categorically denying that she ever prepared such exemplars, no communications were revealed which could even remotely be claimed to be protected by either the attorney-client privilege or the attorney work product doctrine.

But even assuming that the questions had elicited a response admitting the preparation of additional exemplars, the trial judge could not be found to have erred in permitting these inquiries. Clearly, the preparation of exemplars would not have been protected by the attorney-client privilege, since the exemplars were not a protected communication, but simply evidence of the defendant's physical characteristics. See *United States* v. *Kendrick*, 331 F.2d 110, 114 (4th Cir. 1964); *cf. Gilbert* v. *California*, 388 U.S. 263, 266-67 (1967).

Moreover, there is nothing in the record to suggest that the preparation of additional exemplars was meant to be confidential, a precondition to successful assertion of either the privilege or the doctrine. Indeed, since exemplars are a prerequisite to a handwriting comparison and the Government was not requested to release its own exemplars to aid defense preparation, the fact of retention of the expert necessarily revealed to the Government the existence of additional exemplars. Further evidence that the preparation of the exemplars was not intended to be confidential is provided by the fact that defense counsel voluntarily informed the Government that the expert's examination, clearly based on additional exemplars prepared by the defendant, supported the Government's view of the evidence.

Thus, this also was not a case where the prosecutor was probing the defense for disclosure of some unknown damaging fact protected by the work product doctrine. In short, no intrusion or interference with the defense occurred here.*

D. The District Court Acted Properly In Permitting McNally To Be Called As A Rebuttal Witness Limited To Showing That Additional Exemplars Had Been Prepared By Cruz.

Once Cruz had elected to take the stand and deny (1) knowledge of a second handwriting expert and (2) preparation of additional exemplars, the District Court properly exercised its discretion in allowing the Government to call Joseph McNally as a rebuttal witness. This is particularly so, since the court carefully limited McNally's testimony to the fact of his receipt of additional handwriting exemplars identified by Cruz's attorney as those of the defendant.

No confidential attorney-client communications were revealed through McNally's testimony. McNally testified to facts already well known to the Government, because previously revealed by the defense. Moreover, even if McNally were viewed as an agent of Cruz or of her attorney, McNally's testimony did not involve

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* In addition, even if the work product doctrine were applicable, this would have been an appropriate case for the District Court to exercise its discretion to require disclosure. The doctrine is only a qualified bar to disclosure, see *Hickman* v. *Taylor*, *supra*, 329 U.S. at 511; *Nobles* v. *United States*, *supra*, 422 U.S. at 239, and where, as here, the defendant had clearly testified falsely about her lack of knowledge of a second expert, it would have been proper to find that the interest in disclosure outweighed the interests served by the doctrine. See discussion at pages 19-20, *infra*.

"comunications" between Cruz and her attorney, but was limited to whether McNally had received handwriting exemplars prepared by Cruz.

Furthermore, the facts adduced by the Government in its examination of McNally were outside the scope of the work product doctrine. The Government's examination of McNally did not refer in any way to the mental processes, impressions, beliefs or opinions of defense counsel or of McNally. See *Hickman* v. *Taylor*, *supra*. McNally was simply asked whether he had received exemplars represented to be those of Raymunda Cruz from defense counsel. He was not asked, nor did he give, his opinion regarding the authorship of the endorsements.

In *United States* v. *Grammer*, *supra*, 513 F.2d at 676, the Ninth Circuit held that, in providing for the appointment of expert witnesses, the Criminal Justice Act, 18 U.S.C. § 3006A(e)(1), was "intended at the most to provide indigent defendants with an expert whose *report* may be immune from discovery by the Government unless the expert testifies. . . . There is no authority for precluding the Government from revealing the existence of the *expert himself*" (emphasis in original).

But even assuming *arguendo* that the attorney work product doctrine were implicated by the questioning of McNally, the trial court could properly have exercised its discretion in permitting the Government to use McNally to rebut Cruz's testimony. *Hickman* recognized that even "materials obtained or prepared by an adversary's counsel . . . are [not] necessarily free from discovery in all cases." 329 U.S. at 511. Upon a proper showing of need, the Court held, discovery of "relevant and non-privileged facts . . . [even if] hidden in an

attorney's file . . . may properly be had." *Id.** In short, the work product doctrine cannot be used to foist half-truths. See *Nobles* v. *United States*, *supra*, 422 U.S. at 241.**

Here, where the defendant had quite plainly testified falsely about the existence of a defense expert and her preparation of additional exemplars, only McNally could contradict her testimony. In these circumstances, the interest in exposing the defendant's attempt to subvert justice surely outweighed any interest—marginal at best—in preventing disclosure of the defense camp's work product.

In a remarkably similar case, the Tenth Circuit held that a defense handwriting expert, retained pursuant to 18 U.S.C. § 3006A(e) and known to the Government by wholly proper means, could properly be called to give opinion testimony to rebut a defendant's disavowal of questioned handwriting. *United States* v. *Milano*, *supra*, 443 F.2d at 1028. The court stated:

> "More important, assuming that defendant is right and, as the district court ruled, the expert could not testify as part of the government's case, it was still permissible to admit the testimony in rebuttal. To hold otherwise would enable a defendant to convert a weapon devised to assist him in preparing his defense into one which could be unfairly used to immunize falsehood. . . . If, on defendant's taking the stand and swearing that

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* The Court went on to suggest that production might be justified, as here, for impeachment purposes.

** In *Nobles* the Court held that the defendant had waived any privilege regarding notes taken by a defense investigator in calling the investigator as a witness. *Id.* at 239.

> the handwriting . . . was not his, the government were to be rendered helpless to call a known, local expert witness to testify to the contrary, neither justice nor the spirit of the Criminal Justice Act would be served. For, while the latter may arguably not be used to strengthen the government case-in-chief, it cannot serve as a shield for perjury." *Id.*

Cf. *United States* v. *Mandujano*, 44 U.S.L.W. 4629, 4635 (U.S. May 19, 1976); *Harris* v. *New York*, 401 U.S. 222, 226 (1971); *United States* v. *Johnson*, 525 F.2d 999, 1006 (2d Cir. 1975); *United States* v. *Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975); *United States* v. *Curry*, 358 F.2d 904 (2d Cir. 1965), *cert. denied*, 385 U.S. 873 (1966).

E. If There Was Any Error, It Was Harmless.

In any event, the introduction of McNally's testimony, if error, was clearly harmless. The Government's proof on its direct case was overwhelming. That proof consisted of eye-witness testimony identifying Cruz as the person who negotiated the stolen checks and of expert testimony that Cruz forged the signatures on the stolen checks. (Tr. 107, 132, 161-80). The handwriting on the checks, even to the untrained eye, was remarkably similar to that on the exemplars. The patently false explanation Cruz gave the Rivases concerning her possession and negotiation of the checks (Tr. 111, 132-33), as well as the fact that she had agreed to reimburse Anthony Rivas for his losses, were both persuasive evidence of her guilt. Any possible question of her guilt must have been resolved when she testified and clearly committed perjury. She could have been innocent only if both Rivases and Murray, the Government's handwriting expert, had testified falsely, and there was no motive for them to do so.

Even had McNally not been called, the Government could properly have argued to the jury that it could draw an inference against Cruz from her failure to call an expert to controvert Murray's findings. See *United States* v. *Grammer*, *supra*, 513 F.2d at 676; *United States* v. *Lipton*, *supra*, 467 F.2d at 1168-69; *Ignacio* v. *People of the Territory of Guam*, *supra*, 413 F.2d at 521.* The incremental impact of demonstrating to the jury that Cruz had committed perjury by showing that she had prepared handwriting exemplars for McNally was harmless beyond any doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967); *cf. United States* v. *Morgan*, 483 F.2d 435 (10th Cir. 1973) (calling of defense handwriting expert for opinion testimony on rebuttal, if error, was harmless in view of earlier testimony to the same effect by a Government handwriting expert).

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* In summation, the prosecutor limited his remarks on the highly proper questioning of Cruz and rebuttal witness McNally to comments on the strength of the Government's case, the lack of contradictory evidence by the defense, and the unbelievability of Cruz's responses. (Tr. 250, 268). These closing remarks were entirely proper. See *United States* v. *Dioguardi*, *supra*, 492 F.2d at 81-82; *United States* v. *Lipton*, *supra*, 467 F.2d at 1169; *United States ex rel. Leak* v. *Follette*, *supra*, 418 F.2d at 1270; *Ignacio* v. *People of the Territory of Guam*, *supra*, 413 F.2d at 521; *United States* v. *DiBrizzi*, *supra*, 393 F.2d at 646.

Moreover, prompt judicial instructions corrected any misconception which the jury may have had regarding the use of such testimony. Judge Werker instructed the jury that they were governed only by the evidence before them (Tr. 269) and cautioned that, while inferences could be drawn from either side's failure to call a witness, there was no duty to call a witness whose testimony would be merely cumulative of testimony already in evidence. (Tr. 287). See *United States* v. *Lipton*, *supra*; *Ignacio* v. *People of the Territory of Guam*, *supra*.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

David A. Cutner being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 30th day of August, 1976 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Richard G. Rosenbaum, Esq.
225 Broadway
New York, N.Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

David A. Cutner

Sworn to before me this
30th day of August, 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535240
Qualified in Kings County
Commission Expires March 30, 1977